

² Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). The 180th day from June 14, 2016, the date of OWCP's last merit decision, was December 11, 2016. The Board notes, however, that December 11, 2016 fell on a Sunday. It is well established that, when a time limitation expires on a nonbusiness day, the limitation is extended to include the next business day. Therefore, because the time limitation for filing an appeal fell on a Sunday, the time period did not expire until the next business day, which was Monday, December 12, 2016, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(2); *M.H.*, Docket No. 13-1901 (issued January 8, 2014); *Debra McDavid*, 57 ECAB 149, 150 (2005); *Angel M. Lebron, Jr.*, 51 ECAB 488, 490 (2000); *Gary J. Martinez*, 41 ECAB 427, 427-28 (1990).

the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant received a \$60,029.20 overpayment of compensation for the period July 1, 2005 through July 25, 2015; and (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On April 23, 1997 appellant, then a 57-year-old hazardous materials packer, filed a traumatic injury claim (Form CA-1) alleging that on April 2, 1997 she sustained a right knee and back injury when she slipped and fell while carrying boxes. OWCP accepted the claim for chondromalacia of the right knee and aggravation of degenerative disc disease of the spine. Appellant stopped work following her injury and received intermittent wage-loss compensation. On March 18, 1998 she underwent surgery, stopped work, and did not return. OWCP paid appellant wage-loss compensation on the supplemental rolls and then placed her on the periodic rolls beginning July 10, 2005.

By letter dated January 18, 2005, OWCP informed appellant that federal regulations required her to make an affidavit of any earnings and employment during the previous year and that a CA1032 form was enclosed for that purpose. It notified her that she had to completely answer all questions on the CA1032 form and return the statement within 30 days or her benefits would be suspended. Appellant signed a Form CA1032 on January 30, 2005 indicating that she did not receive any retirement benefits from the Social Security Administration (SSA) as part of an annuity for federal service. She continued to submit CA1032 forms dated March 14, 2006 through February 12, 2015 indicating that she did not receive any retirement benefits from SSA.⁴

In a December 13, 2005 action request, the employing establishment notified OWCP that appellant was currently 65 years and 10 months old. It reported that any SSA benefits she was receiving must now be considered as retirement benefits. Since appellant was an employee under the Federal Employees Retirement System (FERS), the employing establishment reported that her compensation payments must now be offset by any part of her SSA retirement benefit that was calculated using her federal employment earnings. It requested OWCP send an SSA FERS offset questionnaire to SSA to inquire as to the proper offset based upon their records.

On August 23, 2006 OWCP received a FERS/SSA Dual Benefit Calculation Form which related that appellant had been under the FERS retirement system since June 25, 1985.

³ 5 U.S.C. § 8101 *et seq.*

⁴ OWCP had regularly requested that appellant complete these CA1032 forms commencing in December 1999.

In a September 7, 2014 FERS/SSA Dual Benefits Calculations worksheet, SSA provided appellant's SSA rate with FERS and SSA rate without FERS from July 2005 through December 2013.⁵

By letter dated August 25, 2015, OWCP informed appellant that she had been receiving dual FERS and SSA retirement benefits. It noted that her FECA benefits must be adjusted based on the FERS portion of her SSA retirement benefits which were attributable to federal service. OWCP reported that appellant's current 28-day benefit amount was \$2,474.00, but that SSA had determined an offset in the amount of \$538.21, the amount of SSA retirement benefits attributable to her federal service.

In an overpayment calculation worksheet, OWCP determined that appellant received an overpayment of compensation in the amount of \$60,029.20 because the FERS offset had not been properly deducted from July 1, 2005 through July 25, 2015. In an accompanying August 10, 2015 FERS/SSA Dual Benefits Calculations worksheet, SSA provided her SSA rate with FERS and SSA rate without FERS from July 2005 through December 2014.

By letter dated February 22, 2016, the employing establishment notified OWCP that, while the FERS retirement offset was implemented beginning July 26, 2015, OWCP had not formally addressed the overpayment of compensation. It noted that OWCP calculated an overpayment of compensation in the amount of \$60,029.20 which occurred from July 1, 2005 through July 25, 2015, the period in which the offset was applicable, but not previously deducted. The employing establishment requested that OWCP formally address the overpayment and also noted that appellant was at fault for the overpayment as she did not report her receipt of SSA benefits on the requisite CA1032 forms.

By notice dated March 22, 2016, OWCP made a preliminary determination that a \$60,029.20 overpayment of compensation was created for the period July 1, 2005 through July 25, 2015 as appellant was paid prohibited dual benefits, having received FECA compensation benefits and SSA retirement benefits without an appropriate offset.⁶ It found that she was at fault in the creation of the overpayment because she knew or reasonably should have known that she was accepting compensation to which she was not entitled and was aware that she must report any additional federal benefits she was receiving *via* the requested CA1032 forms. OWCP provided her with a memorandum calculating the overpayment which showed monthly compensation amounts with FERS and without the FERS offset from July 1, 2005 through July 25, 2015.⁷

⁵ Appellant was born in January 1940 and reached her SSA full retirement age of 66 years and 6 months in July 2006.

⁶ The preliminary determination incorrectly noted the period of the overpayment as July 1 through November 30, 2005.

⁷ In the accompanying memorandum to the file, OWCP showed that it had calculated that for the period July 1, 2005 through November 30, 2015 the FERS offset total amounted to \$61,488.31. It then subtracted \$1,459.11, the equivalent of three periodic rolls 28-day cycles at \$486.37 per cycle, as representing a paid FERS offset for the period July 26 to October 17, 2015. This total resulted in the \$60,029.20 overpayment of compensation.

OWCP requested that appellant complete the enclosed overpayment recovery questionnaire (OWCP-20 form) and submit supporting financial documents. It notified her that she had 30 days to request a telephone conference, a final decision based on the written evidence, or a prerecouplement hearing. OWCP further informed appellant to contact the district office if she had any questions or required assistance in responding to the letter. If a reply was not received within 30 days, it would issue a final decision based on the information of record.

In a March 29, 2016 overpayment action request, appellant requested a prerecouplement telephone conference on the issues of fault and waiver of recovery of the overpayment.

In an accompanying letter dated April 4, 2016, appellant contested the overpayment decision and finding of fault. She argued that she never made an incorrect statement as alleged by OWCP. Appellant noted that she received social security disability benefits as of 2002 in the amount of \$937.00 every four weeks, and that her case worker informed her that she could receive both workers' compensation and SSA benefits. She argued that she was informed that the amount should remain the same as long as she remained partially disabled. Appellant further argued that every year she provided OWCP authorization to obtain earnings data from the SSA and, as such, believed that she was being paid properly because OWCP was checking to make sure everything was up to date. With respect to her responses on the CA1032 forms, she reported that the only funds received were workers' compensation and SSA. Appellant stated that any payment provided in error was the fault of OWCP because she answered all of the questions presented to her. She argued that throughout the years she attempted to contact case workers who would not return her calls or written requests for information. Appellant assumed that the payments and benefits were in compliance with all government laws and procedures.

Appellant reported that she could not repay the overpayment as she lived month-to-month. She further reported that she and her husband were in poor health with costly medication payments. Appellant concluded that the overpayment occurred through no fault of her own and should be waived as repayment would cause her severe financial hardship. In support of her statement, she provided an OWCP-20 form which documented her monthly expenses to document financial hardship.

A conference call was held on May 17, 2016. Appellant requested information regarding the social security offset. The claims examiner advised her that the amount being deducted from her periodic rolls was the result of her receiving social security retirement benefits. Appellant was advised that the overpayment was the result of her compensation not being offset once she reached SSA retirement age in July 2005. She indicated that the creation of the overpayment was OWCP's fault as it was their responsibility to determine the correct payments.

On June 14, 2016 appellant submitted an updated Form OWCP-20 with information regarding her finances and supporting documentation.

By decision dated June 14, 2016, OWCP finalized the preliminary determination of a \$60,029.20 overpayment of compensation. It determined that appellant was at fault in the creation of the overpayment because in July 2005 she reached her full retirement age and received social security retirement benefits under FERS, which she failed to report.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.⁸ Section 8129(a) of FECA provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”⁹

Section 8116(d) of FECA requires that compensation benefits be reduced by the portion of SSA benefits based on age or death that are attributable to federal service.¹⁰ If an employee receives SSA benefits based on federal service, his or her compensation benefits shall be reduced by the amount of SSA benefits attributable to his or her federal service.

OWCP procedures provide that, while SSA benefits are payable concurrently with FECA benefits, the following restrictions apply: in disability cases, FECA benefits will be reduced by SSA benefits paid on the basis of age and attributable to the employee’s federal service.¹¹ The offset of FECA benefits by SSA benefits attributable to employment under FERS is calculated as follows: where a claimant has received SSA benefits, OWCP will obtain information from SSA on the amount of the claimant’s benefits beginning with the date of eligibility to FECA benefits. SSA will provide the actual amount of SSA benefits received by the claimant/beneficiary. SSA will also provide a hypothetical SSA benefit computed without FERS covered earnings. OWCP will then deduct the hypothetical benefit from the actual benefit to determine the amount of benefits which are attributable to federal service and that amount will be deducted from FECA benefits to obtain the amount of the overpayment.¹²

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained chondromalacia of the right knee and aggravation of degenerative disc disease causally related to the accepted April 2, 1997 employment injury. The record supports that she received FECA wage-loss compensation from March 18, 1998 and that she received SSA disability benefits from 2002 until July 2005 when her disability benefits were converted to SSA retirement benefits. The portion of the SSA benefits appellant earned as a federal employee was part of her FERS retirement package, and

⁸ 5 U.S.C. § 8102(a).

⁹ *Id.* at § 8129(a).

¹⁰ *Id.* at § 8116(d). *See N.R.*, Docket No. 12-1853 (issued June 10, 2013).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(a) (February 1995); Chapter 2.1000.4(e)(2) (February 1995); Chapter 2.1000.11 (February 1995); OWCP does not require an election between FECA benefits and SSA benefits except when they are attributable to the employee’s federal service. *See also R.C.*, Docket No. 09-2131 (issued April 2, 2010).

¹² *See L.B.*, Docket No. 11-2076 (issued August 29, 2012).

the receipt of benefits under FECA and federal retirement benefits concurrently is a prohibited dual benefit.¹³ Appellant's FECA compensation was not offset until July 26, 2015. SSA notified OWCP of the applicable SSA rates for that period and their effective dates. Based on these rates, OWCP calculated the dual benefit appellant had received from July 1, 2005 through July 25, 2015, which yielded an overpayment of compensation in the amount of \$60,029.20. The record includes an overpayment worksheet explaining the overpayment calculation.

The Board has reviewed OWCP's calculations of the dual benefits appellant received and finds that OWCP properly determined an overpayment of compensation in the amount of \$60,029.20 from July 1, 2005 through July 25, 2015.

Appellant asserted before OWCP and contends on appeal that she had been told that she was entitled to receive social security benefits as well as FECA benefits.

As noted above, FECA benefits must be reduced by SSA benefits paid on the basis of age and attributable to the employee's federal service.¹⁴

LEGAL PRECEDENT -- ISSUE 2

Under OWCP regulations, waiver of the recovery of an overpayment may be considered only if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹⁵ The fact that the overpayment was the result of error by OWCP or another government employing establishment does not by itself relieve the individual who received the overpayment of liability for repayment if the individual also was at fault for receiving the overpayment.¹⁶ Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she received from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known to be incorrect.¹⁷

With respect to whether an individual is without fault, section 10.433(b) of OWCP regulations provides that whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the

¹³ 5 U.S.C. § 8116(d).

¹⁴ *Supra* note 10.

¹⁵ 20 C.F.R. § 10.433(a).

¹⁶ *Id.* at § 10.435(a).

¹⁷ *Supra* note 15; *see Kenneth E. Rush*, 51 ECAB 116 (1999).

overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.¹⁸

ANALYSIS -- ISSUE 2

The Board finds that appellant was at fault in creating the \$60,029.20 overpayment of compensation.

The record reflects that appellant accepted payments covering the period July 1, 2005 through July 25, 2015 which she knew or should have known to be incorrect.¹⁹ She was advised on multiple occasions that receipt of SSA retirement benefits would affect her entitlement to FECA compensation, but she continued to accept full FECA benefits during the period July 1, 2005 through July 25, 2015 in addition to her SSA retirement benefits.

Commencing December 13, 1999 on CA1032 forms through February 12, 2015, appellant was repeatedly asked if she received SSA retirement benefits as part of an annuity under FERS benefits from federally-assisted disability or benefit programs as this would affect her benefits from OWCP. She continually answered "no." By signing these forms, appellant certified that all of the statements made in response to the questions on the form were true, complete, and correct to the best of her knowledge and belief.

Despite being given notice that receipt of SSA benefits would reduce her entitlement to FECA compensation, appellant continued to accept full FECA benefits during the period July 1, 2005 until July 25, 2015. The Board thus finds her at fault under the third standard, as she accepted compensation which she knew or should have known that she was not entitled to receive and, as such, recovery of the overpayment of compensation in the amount of \$60,029.20 may not be waived.²⁰

On appeal, appellant continues to allege that she was not at fault in the creation of the overpayment as she always provided OWCP with correct information, but as noted above she did not inform OWCP on multiple CA1032 forms issued during the relevant time period that she was in fact receiving SSA retirement benefits based upon her FERS annuity.

The Board, therefore, concludes that OWCP properly determined that appellant was at fault in the creation of the overpayment and that waiver of recovery of the overpayment is therefore precluded.

CONCLUSION

The Board finds that OWCP properly determined that appellant received a \$60,029.90 overpayment of compensation for the period July 1, 2005 through July 25, 2015 and that she was

¹⁸ *Id.* at § 10.433(b).

¹⁹ *See J.C.*, Docket No. 16-1889 (issued May 17, 2017).

²⁰ 5 U.S.C. § 8129(b); *supra* note 15.

at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the June 14, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 12, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board